STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
FERNANDO VALLADARES,	)	
	)	Charge No.: 2005CF3353
Complainant,	)	EEOC No.: 21BA52038
	)	ALS No.: 07-011
and	)	
	)	
BOB CHIN'S CRAB HOUSE,	)	
	)	
Respondent.	)	

ORDER

This matter coming before the Commission pursuant to a Recommended Order and Decision, the Complainant's Exceptions filed thereto, and the Respondent's Response to the Complainant's Exceptions.

The Illinois Department of Human Rights is an additional statutory party that has conducted state action in this matter. They are named herein as an additional party of record. The Illinois Department of Human Rights did not participate in the Commission's consideration of this matter.

IT IS HEREBY ORDERED:

1. Pursuant to 775 ILCS 5/8A-103(E)(1) & (3), the Commission has **DECLINED** further review in the above-captioned matter. The parties are hereby notified that the Administrative Law Judge's Recommended Order and Decision, entered on **December 20, 2010** has become the Order of the Commission.

STATE OF ILLINOIS	)	
	)	**Entered this 28th day of October 2011**
HUMAN RIGHTS COMMISSION	)	

Commissioner Munir Muhammad

Commissioner Rozanne Ronen

Commissioner Nabi Fakroddin

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BOB CHINN'S CRAB HOUSE,	)	
	)	**Judge Lester G. Bovia, Jr.**
Respondent.	)	

RECOMMENDED ORDER AND DECISION

This matter came to be heard for a public hearing conducted on October 5 and 6,, 2010, at which both parties appeared and participated with counsel. Only Complainant testified during his case-in-chief; Respondent called five witnesses during its case-in-chief. The parties also have filed post-hearing briefs. Accordingly, this matter is now ready for a decision.

The Illinois Department of Human Rights ("Department") is an additional statutory agency that has issued state actions in this matter. Therefore, the Department is an additional party of record.

CONTENTIONS OF THE PARTIES

Complainant alleges that two of Respondent's employees subjected him to sexual harassment. Complainant also alleges that Respondent discharged him in retaliation for his opposition to sexual harassment. Respondent asserts that the allegedly harassing conduct about which Complainant complains, even if it did occur, did not constitute sexual harassment under the law. Respondent also asserts that it suspended Complainant, but did not discharge him, and that it suspended Complainant solely because he violated company policy.

FINDINGS OF FACT

The following facts were derived from the evidence presented at the public hearing. Factual assertions made at the public hearing, but not addressed in these findings, either were

not proven by a preponderance of the evidence or were deemed immaterial to the resolution of this case.

1. Respondent is a seafood restaurant.

2. During all relevant times, Complainant worked for Respondent as a busboy.

3. In or about April 2002, and then again in or about September 2003, fellow busboy Martin Estefania stood behind Complainant while Complainant was bussing a table and playfully made a pumping motion against Complainant's behind to simulate a sex act. Because the incidents occurred in front of customers, the incidents made Complainant upset.

4. Complainant complained about the April 2002 incident to Alma Franco, Respondent's human resources administrator, who admonished Mr. Estefania.

5. During his employment with Respondent, Complainant routinely initiated and engaged in sexual horseplay at work, including horseplay similar to the "pumping" incidents.

6. In or about November 2004, Mr. Estefania made an unwelcome sexual advance toward Complainant.

7. Complainant rejected Mr. Estefania's advance and complained to Ms. Franco. Mr. Estefania later apologized and made no other advances toward Complainant.

8. In or about January 2005, Respondent's general manager, Deno Roumanidakis, grabbed his crotch and told Complainant, "This is for your culo (ass)." At the time that Mr. Roumanidakis made the comment, he was still angry with Complainant about an incident from earlier that day in which Complainant refused to sign a written warning form.

9. As a busboy, Complainant was not authorized to enter Respondent's raw bar area and serve himself food or drink from the raw bar.

10. On May 25, 2005, Ms. Franco sent Complainant home from work to punish Complainant for serving himself a guava juice without proper authorization to enter Respondent's raw bar area, which is where the guava juice is kept.

11. Complainant did not return to work after May 25, 2005.

12. On January 8, 2007, the Department filed a complaint on Complainant's behalf, alleging that Respondent subjected Complainant to sexual harassment and retaliated against Complainant for objecting to sexual harassment.

CONCLUSIONS OF LAW

1. Complainant is an "aggrieved party" and Respondent is an "employer" as those terms are defined in the Illinois Human Rights Act ("Act"), 775 ILCS 5/1-103(B) and 2-101(B).

2. Complainant failed to establish a *prima facie* case of sexual harassment by a preponderance of the evidence.

3. Complainant failed to establish a *prima facie* case of retaliation by a preponderance of the evidence.

4. Respondent articulated a legitimate and nondiscriminatory reason for disciplining Complainant, and Complainant failed to establish that Respondent's proffered reason was pretextual by a preponderance of the evidence.

5. Respondent is entitled to a recommended order in its favor on both of Complainant's claims.

ANALYSIS

I. Complainant Failed to Prove His Sexual Harassment Claim by a Preponderance of the Evidence

At different times while this case has been pending, Complainant has alleged numerous acts of sexual harassment which he attributes to Respondent. However, at the public hearing, Complainant presented evidence of only three types of conduct:

1. Complainant testified that in or about April 2002, and then again in or about September 2003, Mr. Estefania stood behind Complainant while Complainant was bussing a table and playfully made a pumping motion against Complainant's behind to simulate a sex act. (Tr. at 105-10.) Complainant admitted that he and fellow employees often had engaged in horseplay, but he distinguished Mr. Estefania's two "pumping" incidents from their usual

horseplay because Mr. Estefania was "doing [it] like the real thing," and because the conduct occurred in front of customers. (Id. at 107-08.) Complainant also testified that "the only reason" he became upset about Mr. Estefania's conduct was because it occurred in front of customers. (Id. at 108.) Complainant testified further that he complained to Ms. Franco after the first "pumping" incident. (Id. at 105-09.) Although Ms. Franco and Complainant disagreed about the approximate dates in question, Ms. Franco testified that Complainant did complain to her about one of the "pumping" incidents, that she admonished Mr. Estefania accordingly, and that Complainant never complained to her about any further "pumping" incidents. (Id. at 298-302.)

2. Complainant testified that Mr. Estefania made an unwelcome sexual advance toward him in or about November 2004. According to Complainant, Mr. Estefania offered Complainant two paychecks in exchange for sex. (Id. at 110-18.) Complainant is not certain whether Mr. Estefania was serious, but he believes so because Mr. Estefania offered him money. (Id. at 114-15.) Complainant rejected Mr. Estefania's advance and complained to Ms. Franco. (Id. at 114-18.) Complainant testified that Mr. Estefania later apologized and made no other advances toward him. (Id. at 117, 121-22.)

3. Complainant testified that, in or about January 2005, Deno Roumanidakis grabbed his crotch and told Complainant, "This is for your culo (ass)." (Id. at 135-36.) Complainant testified that he immediately chastised Mr. Roumanidakis, saying, "Why are you using the strong language? I use it, too, but you're the manager." (Id. at 139.) According to Complainant, at the time of Mr. Roumanidakis' comment, Mr. Roumanidakis was still "very mad" about an incident from earlier that day, where Complainant refused to sign a written warning regarding unauthorized overtime that Complainant had worked. (Id. at 129-36.)

Section 2-101(E) of the Act defines sexual harassment as:

> . . . any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when: (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or (3) such conduct has the

> purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

775 ILCS 5/2-101(E). This case involves the third clause, as Complainant alleges that Respondent's conduct had the effect of creating an intimidating, hostile, or offensive working environment.

Factors to be considered when assessing whether a work environment was sufficiently intimidating, hostile, or offensive include: 1) the frequency of the conduct; 2) the severity of the conduct; 3) the physically threatening or humiliating nature of the conduct; and 4) the interference that the conduct had on the employee's work performance. Dean and Flexser, IHRC, ALS No. S05-387, August 3, 2007, citing Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993). Moreover, a complainant must show that the conduct in question created a work environment that was both objectively *and* subjectively intimidating, hostile, or offensive. Id.

Regarding the "pumping" incidents, Complainant did not establish by a preponderance of the evidence that the incidents were subjectively intimidating, hostile, or offensive. First, Complainant admitted unequivocally that "the only reason" he became upset about the incidents was because they occurred in front of customers. (Tr. at 108.) It follows logically that Complainant would not have been upset had the incidents occurred out of the customers' sight. The fact that Complainant only took offense to the incidents because of where they occurred or who may have witnessed them compels the conclusion that he did not view them as subjectively intimidating, hostile, or offensive within the meaning of the Act.

Second, there was substantial, highly credible testimony from Complainant's former co-workers that Complainant himself had engaged in sexual horseplay at work that was at least as bad as that about which he complains here. For example, Respondent's kitchen manager Abel Arias testified that Complainant often would reach his hand between the legs of an unsuspecting co-worker from behind and grab the co-worker's crotch. (Id. at 351.) Mr. Arias also testified that Complainant often would walk in front of a co-worker, suddenly drop

something on the floor, and trick the unsuspecting co-worker into bumping into Complainant's behind as he bent over. (Id. at 349-51.) Furthermore, Ms. Franco testified that when she confronted Mr. Estefania, Mr. Estefania told her that Complainant had been committing the exact same type of "pumping" conduct on him. (Id. at 299-300.) Although he did not admit to committing the specific acts described by his former co-workers at the public hearing, Complainant did acknowledge that he engaged in workplace horseplay. (Id. at 148, 184-85.) In short, when compared to the horseplay that the evidence showed Complainant himself engaged in (and thus presumably found acceptable), the two "pumping" incidents could not have been subjectively intimidating, hostile, or offensive within the meaning of the Act.

Regarding Mr. Estefania's sexual advance, Complainant did not establish by a preponderance of the evidence that the conduct was objectively intimidating, hostile, or offensive. Simply put, Complainant's testimony about the incident made it clear that the incident was a one-time event by a non-supervisory co-worker involving mere words. The Commission often has found that an isolated sexual advance does not rise to the level of actionable sexual harassment. See, e.g., Doza and Mid-America Sec., IHRC, ALS No. 4063(S), July 26, 1991 (holding one sexual advance, which also included a clearly unwelcome kiss and resulted in credible emotional distress, was an "isolated, trivial incident [and not] sexual harassment"); Lay and St. Mary's Hosp., IHRC, ALS No. 2078(K), September 25, 1987 (holding one sexual advance did not rise to the level of sexual harassment under the Act, as "one single incident could hardly be said to have colored [the complainant's] entire working environment"). As was the case in Doza and Lay, the isolated incident about which Complainant complains clearly was not severe or pervasive enough to be actionable under the Act.

Finally, regarding Mr. Roumanidakis' "This is for your culo" comment, Complainant did not establish by a preponderance of the evidence that the comment was objectively intimidating, hostile, or offensive. There was no credible evidence presented that Mr. Roumanidakis' comment was intended for literal interpretation (*i.e.*, that Mr. Roumanidakis wanted to have sex

with Complainant). Rather, Complainant's testimony about the overall context of the comment convinces me that the comment was Mr. Roumanidakis' vulgar way of expressing his anger about Complainant refusing to sign a written warning earlier that same day. As the Commission made clear in Dean, the purpose of the Act is not to cleanse supervisors' boorish language. See Dean, *supra* (stating "it is not enough for a complainant in a sexual harassment case to show that her supervisor failed to treat her with sensitivity, tact, or delicacy when using coarse language or acting as a boor . . . because such failures are too commonplace in today's America, regardless of the sex of the employee, to be classified as discriminatory"); see also Howard and Owen Healthcare, Inc., IHRC, ALS No. S-10145, October 20, 1999 (same).

In sum, based on the above, I find that none of the three types of conduct described by Complainant constitutes actionable sexual harassment under the Act. Therefore, Complainant has failed to prove his sexual harassment claim by a preponderance of the evidence.

II. Complainant Failed to Prove His Retaliation Claim by a Preponderance of the Evidence

Complainant alleges that Respondent discharged him because he complained to Ms. Franco about alleged sexual harassment on two occasions: in or about April 2002 after the first "pumping" incident, and in or about November 2004 after Mr. Estefania's sexual advance.

To establish a *prima facie* case of retaliation, Complainant must show: 1) he engaged in a protected activity; 2) he experienced an adverse job action; and 3) there was a causal nexus between the protected activity and the adverse job action. Carter Coal Co. v. Human Rights Comm'n, 261 Ill. App. 3d 1, 7, 633 N.E.2d 202, 207 (5th Dist. 1994). If Complainant can establish a *prima facie* case of retaliation, then the burden shifts to Respondent to offer a legitimate and nondiscriminatory reason for the adverse job action. Craig and Ill. Dep't of Employment Sec., IHRC, ALS No. S-5313, December 10, 1996. After Respondent's offer of a legitimate and nondiscriminatory reason for the adverse job action, Complainant must prove that the proffered reason is a pretext for unlawful retaliation. Id.

In this case, there is no dispute that Complainant engaged in protected activities by complaining about alleged sexual harassment on two occasions. Thus, Complainant met his burden regarding element one.

There also is no dispute that Complainant received some type of discipline on May 25, 2005, his last day of work. The parties disagree as to whether that discipline constituted a one-shift suspension (as Respondent asserts) or discharge (as Complainant asserts). However, I need not resolve that disagreement, as any adverse job action suffices. Therefore, Complainant met his burden regarding element two.

Complainant's retaliation claim fails at element three. There simply was no evidence presented to suggest that Respondent's disciplinary action had anything to do with Complainant's sexual harassment complaints. Rather, the highly credible testimony of Respondent's witnesses, including Ms. Franco and Dan Erdman, Respondent's floor manager and Complainant's direct supervisor, makes it clear that Respondent disciplined Complainant solely because he served himself a guava juice without proper authorization to enter Respondent's raw bar area, which is where the guava juice is kept. (Tr. at 286-87, 325-27.) Even Complainant has acknowledged that, as a busboy, he had no authority to enter Respondent's raw bar area and serve himself a drink. (Complainant's Response to Request to Admit No. 7.)

It is worth noting that a complainant can establish a causal connection indirectly by proving that the protected activity was followed closely in time by the adverse job action. Maye v. Human Rights Comm'n, 224 Ill. App. 3d 353, 362, 586 N.E.2d 550, 556 (1st. Dist. 1991). In this case, however, the gap between Complainant's last sexual harassment complaint (in November 2004) and Respondent's disciplinary action (in May 2005) was six months. A gap of six months has been held to be too great to create an inference of a causal connection. See, e.g., Stokes and City of Kankakee Fire Dep't, IHRC, ALS No. 09-322, November 4, 2009;

Mitchell and Local Union 146 Int'l Bhd. of Elec. Eng'rs, IHRC, ALS No. 947(Y), December 16, 1985. Thus, I find that Complainant is entitled to no such inference in this case.

Even if Complainant could have established a *prima facie* case of retaliation, that would not have been the end of the inquiry because Respondent has articulated a legitimate and nondiscriminatory reason for disciplining Complainant. As discussed above, Respondent asserts that it suspended Complainant for the remainder of his shift because he served himself a guava juice without proper authorization to enter Respondent's raw bar area. The issue, then, is whether Complainant can prove that Respondent's proffered reason is pretextual.

To prove pretext, Complainant must show: 1) the proffered reason has no basis in fact; 2) the proffered reason did not actually motivate the decision; or 3) the proffered reason is insufficient to have motivated the decision. Stephenson and Chicago Transit Auth., IHRC, ALS No. 06-442, August 23, 2010. In short, a pretext is a lie. Id.

Complainant argues that the proffered reason could not have actually motivated the decision to discipline him because he had served himself guava juice on numerous occasions. (Tr. at 56-57.) He also testified that several managers, including Mr. Erdman and Manny Roumanidakis, personally saw Complainant serving himself on some of those occasions and never confronted him. (Id. at 58-59.) Thus, Complainant asserts, he must have been disciplined for some reason other than that articulated by Respondent.

In response, Respondent proffered the testimony of Deno and Manny Roumanidakis and Mr. Erdman, all of whom credibly denied ever witnessing Complainant in the raw bar area other than on May 25, 2005. (Id. at 327-28, 330, 341, 366-67.) Furthermore, Ms. Franco, the specific employee who made the decision to send Complainant home that day, testified convincingly that the discipline she imposed had nothing whatsoever to do with the sexual harassment complaints. (Id. at 286-87.) To support her point, Ms. Franco provided the reasons why access to the raw bar area is restricted in the first place: 1) food safety – the seafood in the raw bar area is easily contaminable and, thus, access to that area must be limited to properly trained

employees for the safety of the customers; 2) loss prevention – the foods in the raw bar area are susceptible to theft and inviting for thieves; and 3) space considerations – the raw bar area is too small to fit more than one or two employees at a time. (Id. at 278-79.) In short, according to Mr. Erdman, an employee who enters the raw bar area without proper authorization has committed "a very serious act." (Id. at 332.) In fact, according to many of Respondent's witnesses, it is so well understood that the raw bar area is off-limits to unauthorized employees that Respondent rarely needs to discipline employees for such. (Id. at 315-16, 330-32, 366-67.)

Having weighed the evidence on the issue of pretext, I find that Respondent's evidence was more persuasive. It seems highly unlikely to me that several of Respondent's managers would have observed a busboy serving himself in the raw bar area on numerous occasions and failed to confront him. Simply put, I am unconvinced that the reason proffered by Respondent for disciplining Complainant is a lie. Therefore, I find that Complainant failed to establish pretext by a preponderance of the evidence.

RECOMMENDATION

Based on the foregoing, Complainant has failed to establish his sexual harassment and retaliation claims by a preponderance of the evidence, and Respondent is entitled to a recommended order in its favor on both of Complainant's claims. Accordingly, it is recommended that the complaint and underlying charge be dismissed with prejudice.

HUMAN RIGHTS COMMISSION

BY: _____

LESTER G. BOVIA, JR.
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: December 20, 2010